

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AVALONBAY COMMUNITIES, INC.,

Employer,

and

Case No. 02-RC-238385

**LOCAL 30, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,**

Petitioner.

**REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND CERTIFICATION OF REPRESENTATIVE AND
REQUEST TO STAY CERTIFICATION PENDING THE BOARD'S REVIEW**

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Pursuant to Sections 102.67(c) and 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or the “Board”), AvalonBay Communities, Inc. (“AvalonBay” or the “Employer”) submits the following Request for Review of the Decision and Certification of Representative issued by the Regional Director of Region 2 of the National Labor Relations Board on April 30, 2020 (“RD Decision”).¹

I. PRELIMINARY STATEMENT

AvalonBay seeks review of the RD Decision, which is based on erroneous determinations concerning substantial factual issues and misapplication of Board law. The testimony and documentary evidence AvalonBay submitted established that the Maintenance Supervisors allowed to vote under challenge in this matter are supervisors under Section 2(11) of the National Labor Relations Act (“Act”) and engaged in coercive actions that tainted the election.

The Maintenance Supervisors exercise independent judgment in directing and assigning the daily work of the Maintenance Technicians they oversee. The Regional Director disregarded

¹ The RD Decision is appended hereto as Appendix A.

direct, relevant testimony and evidence establishing such 2(11) supervisory authority, including evidence that Maintenance Supervisors are held accountable for the work they assign and direct Maintenance Technicians to perform under AvalonBay's incentive bonus and merit wage increase programs. The Regional Director ignored such evidence on the erroneous determination that all relevant testimony was "conclusory" or elicited by leading questions, and all documentary evidence merely demonstrated "paper authority." The testimony and evidence AvalonBay submitted also established that Maintenance Supervisors play an integral role in hiring, promotions, and disciplinary decisions through effective recommendations, and possess numerous indicia of supervisory status. Further, the Regional Director ignored substantial evidence of supervisory taint including evidence that Maintenance Supervisors actively campaigned against and denigrated AvalonBay, solicited authorization cards, and widely disseminated (untrue) threats that AvalonBay would remove housing benefits in retaliation for employees' support of the Union.

Accordingly, the Board should grant review of the RD Decision because the Regional Director departed from Board precedent, made clearly erroneous decisions on substantial factual issues, and affirmed prejudicial rulings made in connection with the conduct of the hearing below. *See* 29 C.F.R. § 102.67(d)(1)-(3). Further, the Board should stay the RD Decision pending review, as the issues raised herein are sufficient to reverse the certification and overturn the results of the election. *See* 29 C.F.R. § 102.67(j)(ii); *Maremont Corp.*, 239 NLRB 240 (1978) (staying certification pending review of supervisory taint).

II. STATEMENT OF THE CASE

On or about March 26, 2019, the Union filed a petition to represent a unit of maintenance employees. The Union sought to include Maintenance Technician I, II, and III classifications as

well as Maintenance Supervisors at AvalonBay's Westchester communities in the unit.² AvalonBay asserted that Maintenance Supervisors must be excluded as supervisors under Section 2(11) of the Act. The parties agreed to a Stipulated Election Agreement under which Maintenance Supervisors voted subject to challenge, with their supervisory status to be determined after the election.³ At the election on April 23, 2019, a majority of employees cast votes in favor of the Union. The ballots of all four (4) Maintenance Supervisors were challenged and not opened, which under Board authority would alter the margin of victory such that a change in as few as five (5) votes would change the election result. On April 30, 2019, AvalonBay submitted timely objections and offers of proof, asserting that the Region should set aside the results of the April 23, 2019 election because, *inter alia*, Maintenance Supervisors possess 2(11) supervisory authority and participated in coercive behavior sufficient to taint the election.⁴

A hearing on objections took place on October 17, 18, 23, 24, and November 4, 2019. At the hearing, AvalonBay established that Maintenance Supervisors independently assign tasks to Maintenance Technicians, evaluate the nature and urgency of maintenance tasks to be performed, and assign tasks based on the skill, ability, and availability of the workforce. The testimony and evidence further established that Maintenance Supervisors are responsible for directing the overall

² AvalonBay develops and manages residential apartment communities, including six in Westchester, New York—Avalon Bronxville, Avalon Mamaroneck, Avalon White Plains, Avalon Somers, Avalon Green, and Avalon Ossining. AvalonBay employs three levels of Maintenance Technicians (I, II, and III) to perform maintenance work. A Maintenance Supervisor, Maintenance Manager, or Senior Maintenance Manager supervises Maintenance Technicians at each community. *See* Employer's Exhibit E-32 (hereinafter referred to as "Ex. E-__"). The Employer's exhibits referenced in this Request for Review are appended hereto as Appendix B. The Petitioner's exhibits (hereinafter referred to as "Ex. P-__") referenced in this Request for Review are appended hereto as Appendix C. The hearing transcript (hereinafter referred to as "Tr. at __") is appended hereto as Appendix D.

³ The Stipulated Election Agreement is appended hereto as Appendix E.

⁴ AvalonBay's objections are appended hereto as Appendix F.

work of Maintenance Technicians using independent judgment. AvalonBay holds Maintenance Supervisors accountable for such work through both their own performance evaluations, which dictate annual wage increases, and a bonus program applicable only to employees at the Maintenance Supervisor level or above, which is based on how Maintenance Technicians perform the work that Maintenance Supervisors direct to be completed. Further, testimony and evidence established that Maintenance Supervisors possess the authority to promote and reward Maintenance Technicians through the completion of annual performance evaluations, which govern Maintenance Technicians' potential wage increases, and effective recommendations for promotion. Additionally, Maintenance Supervisors perform an integral role in the hiring of Maintenance Technicians, and hold authority to effectively recommend both for and against hiring candidates for such positions. Maintenance Supervisors also have the power to issue counseling forms and recommend progressive discipline for the employees they supervise.

AvalonBay also established that multiple Maintenance Supervisors solicited union authorization cards, engaged in a widespread campaign against AvalonBay throughout the critical period, and repeatedly communicated a threat to Maintenance Technicians that AvalonBay planned to remove employees' housing benefits for their support of the Union in an effort to coerce employees into voting for the Union to obtain protection from such retaliation. On December 20, 2019, the Hearing Officer issued a Hearing Officer's Report on Objections ("HOR"), in which he recommended to overrule all of AvalonBay's objections.⁵ On January 17, 2020, AvalonBay filed exceptions to the HOR. On April 30, 2020, the Regional Director issued the RD Decision, adopting the HOR's recommendation to overrule the objections and certifying the Union.

⁵ The HOR is appended hereto as Appendix G.

III. ARGUMENT

A. The Regional Director Departed from Board Precedent by Disregarding and Failing to Sufficiently Address Relevant Evidence

The Regional Director ignored significant and relevant portions of testimony and evidence demonstrating Maintenance Supervisors' supervisory authority and conduct demonstrating supervisory taint. Further, the Regional Director erred in discounting and disregarding significant portions of testimony based not upon the credibility or demeanor of witnesses, but rather because he viewed witness testimony as "conclusory" or in response to what he characterized as leading questions.⁶ The Regional Director, however, failed to explain how such testimony was "conclusory,"⁷ or even identify the specific testimony with which he took issue.

The Regional Director improperly brushed aside AvalonBay's exceptions to the Hearing Officer's errors to conclude that the Hearing Officer "appropriately weighed the record evidence" and "[a]ll of the Hearing Officer's credibility findings are correct by a clear preponderance of all relevant evidence. RD Decision at 2, n.2."⁸ In reaching these conclusions, the Regional Director selectively cited to two transcript excerpts and asserted:

⁶ Indeed, the only reference to credibility in the HOR is to Maintenance Manager Ramses Perez, for whom the Hearing Officer stated "[t]hough I do not find Perez to be incredible, his conclusory testimony on [hiring authority] appeared to be implausible and exaggerated." HOR at 23, n.17.

⁷ For example, the Regional Director disregarded Maintenance Manager Sadik Rizai's testimony that he followed Maintenance Supervisor Denilson Da Silva's recommendation against hiring as conclusory. RD Decision at 3. Rizai, however, testified in detail regarding the interview process, Da Silva's recommendation against hire, that the candidate was not hired, and that he would not hire a candidate if Da Silva recommended not to hire a candidate. *See* Tr. at 450-452, 457-459. Such evidence, unrefuted elsewhere in the record, establishes 2(11) authority to hire through effective recommendation. *See Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

⁸ To the contrary, the Regional Director acknowledged that the "Hearing Officer did not overtly wholly credit or discredit any of the witnesses[.]" RD Decision at 5. As here, where witness demeanor is not the basis of a credibility determination, the Board itself "properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole.'" *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citation omitted).

There was extensive testimony in which witnesses, in response to leading questions, stated in a conclusive manner that maintenance supervisors possessed the authority of supervisors as defined in Section 2(11) of the Act. The Hearing Officer referenced much of this testimony, and, when he found it not to be probative, clearly explained his reasoning.

RD Decision at 2. The Regional Director further justified affirming the Hearing Officer's deficient consideration of evidence and testimony, and corresponding erroneous legal determinations, by concluding that relevant testimony was vague or lacked sufficient specificity and documentary evidence merely indicated "'paper' authority." RD Decision at 3-6.

In condoning the Hearing Officer's disregard of testimony purportedly elicited by leading questions and conclusory in nature, the Regional Director "miscomprehended the nature of leading questions and erroneously discounted testimony that [t]he deemed elicited through leading questions." *Millard Refrigerated Servs., Inc.*, 345 NLRB 1143, 1144 (2005). "Even assuming that the question[s] were] leading, Rule 611(c) of the Federal Rules of Evidence permits [the use of] leading questions when 'necessary to develop testimony.'" *Id.* (citation omitted). Compounding the error, the Regional Director affirmed the Hearing Officer's inexplicable decision to credit the testimony of Union witnesses that was elicited by the same type of questions that the Hearing Officer labeled as "leading" when proffered by the Employer, and indistinguishable in nature from the testimony of AvalonBay witnesses, which the Hearing Officer characterized as "conclusory."⁹ "It is hard to imagine a more violent breach of th[e] requirement [of reasoned decisionmaking] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998).

⁹ See, e.g., HOR at 11 ("Wilson affirmatively testified that he does not have the authority to hire as a maintenance supervisor"); (Tr. at 588) ("[Union's Counsel]: 'Do you personally have the authority as a maintenance supervisor to hire anyone?' [Wilson]: 'No.'")

In a similar manner, the Regional Director improperly applied the concept of “paper authority” to disregard documentary evidence establishing 2(11) authority. For example, at the hearing, AvalonBay introduced the Maintenance Supervisors’ performance evaluations and AvalonBay’s Annual Merit Wage Increase Guideline, which sets forth the amount of merit wage increases Maintenance Supervisors are eligible to receive each year. *See* Ex. E-15 – E-22, E-43. In the evaluations, Maintenance Supervisors receive performance ratings based on their direction of Maintenance Technicians and the Maintenance Technicians’ corresponding performance of assigned work. *See* Ex. E-15 – E-22. In turn, the amount of merit wage increases Maintenance Supervisors receive each year under the Annual Merit Wage Increase Guideline range from 0% to 6.5% based upon the overall rating received in a performance evaluation. Ex. E-43. Accordingly, documentary evidence demonstrates that Maintenance Supervisors are held accountable for their direction of Maintenance Technicians, thus establishing 2(11) authority to responsibly direct. *See, e.g., Golden Crest Healthcare Ctr.*, 348 NLRB 727, 731 (2006).

Nevertheless, the Regional Director concluded that even if evidence established that Maintenance Supervisors direct other employees, such direction is not responsible because “the documentary evidence in this respect does not suffice to show the claimed authority of maintenance supervisors.” RD Decision at 12 (citing *Loyalhanna Care Ctr.*, 352 NLRB No. 105 (2008), for the proposition that “paper authority” is insufficient to establish supervisory status). The documentary evidence found deficient in *Loyalhanna*, which lacked corroboration by additional evidence, is readily distinguishable from the evidence introduced here. The performance evaluations set forth evaluation criteria based on Maintenance Supervisors’ direction of Maintenance Technicians and the Annual Merit Wage Increase Guideline dictates annual merit wage increases based on that criteria. In the performance evaluations each Maintenance

Supervisor received individualized overall ratings. *See* Ex E-15 – E-22. Those individualized overall ratings directly correspond to receipt of a higher or lower annual merit wage increase under the Annual Merit Wage Increase Guideline. *See* Ex. E-43. Accordingly, AvalonBay’s exhibits provide concrete documentary evidence of Maintenance Supervisors’ supervisory authority, rather than mere “paper authority”. Thus, the Regional Director plainly misapplied the evidentiary constraints of the Board’s concept of “paper authority,” disregarding significant and relevant evidence of Maintenance Supervisors’ 2(11) status simply because the evidence physically appeared on paper. Moreover, multiple witnesses specifically corroborated the supervisory authority borne out by AvalonBay’s exhibits, testifying that the performance ratings from the evaluations are a “direct reflection” on the Maintenance Supervisors’ direction of Maintenance Technicians and govern the merit wage increases the Maintenance Supervisors receive according to the Annual Merit Wage Increase Guideline. *See* Tr. at 51, 317-318, 467-75. The Board should reverse the Regional Director’s departure from applicable Board authority.¹⁰

B. The Determination that Maintenance Supervisors Do Not Possess 2(11) Authority to Assign Is Contrary to the Record and Board Law

The Regional Director disregarded evidence establishing supervisory status, discredited such evidence without sufficient explanation, and made inferential leaps based on assumptions unsupported by the record. The Regional Director affirmed the Hearing Officer’s decision to credit the self-serving testimony of one of the Union’s key supporters over four (4) AvalonBay witnesses without reasonable explanation for such determinations and absent preponderant support in the

¹⁰ *See The Arc of South Norfolk*, 2018 WL 3914704, at *1 (finding Acting Regional Director “may have disregarded relevant evidence and thereby clearly erred in finding [putative supervisors] did not exercise statutory supervisory authority with respect to the assignment and responsible direction[.]”); *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287 (5th Cir. 2015) (“The Board ignored significant portions of the record that show how [putative supervisors] arguably exercise independent judgment when deciding how to allocate [subordinate] workers.”).

record. Proceeding from these errors, the Regional Director misapplied the law to conclude that Maintenance Supervisors do not possess the authority to exercise, or effectively recommend, any 2(11) supervisory functions.

1. Factual Support that Maintenance Supervisors Possess 2(11) Supervisory Authority to Assign

AvalonBay's position description for Maintenance Supervisors provides that Maintenance Supervisors' "essential job functions" include:

4. Executes customer service requests, including prioritization, delegation to assigned staff, and execution, maintains customer service standards and follows through to ensure issues are resolved.
5. Schedules and oversees the apartment home turnover and preventive maintenance programs to maximize the value to the community
...
7. Performs personnel duties as required including timekeeping, associate scheduling, work assignments, and training and provides input to manager regarding hiring, performance and termination.

Ex. E-1. Each witness whom AvalonBay called to testify, including Maintenance Supervisor Jonathan Wilson, called by the Union, corroborated that Maintenance Supervisors possess the authority to assign Maintenance Technicians, and in fact exercise that authority. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003) ("The employee is not required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor.") (citations and alterations omitted). The Regional Director's determination to disregard the 2(11) authority to assign outlined in the position description and corroborated by the clear, detailed witness testimony outlined below is contrary to applicable Board authority for the same reasons outlined above, *supra*, Section III.A.

The Regional Director ignored the detailed testimony from Ramses Perez, who served as

a Maintenance Manager at AvalonBay's Green community during the hearing.¹¹ While previously serving as a Maintenance Supervisor, Perez assigned Maintenance Technicians to perform work, both verbally and through MRI. Tr. at 199-202. Perez stated that as a Maintenance Supervisor he prioritized and assigned work to Maintenance Technicians based on the nature of work to be performed, urgency of the situation, (*e.g.*, addressing a water leak before a clogged toilet) and experience or skills of Maintenance Technicians. Tr. at 201-202. Perez testified that as a Maintenance Manager he supervised Maintenance Supervisors Brian Pieragostini and Denilson Da Silva, and that both assigned Maintenance Technicians to perform work in the same way. Tr. at 209-211, 215-216. The Maintenance Supervisors he supervised approved overtime work and vacation requests. Tr. at 249, 252-253. Perez testified that vacation requests are subject to Maintenance Supervisor approval and that, as a Maintenance Manager, he would not review vacations scheduled in Kronos. Tr. at 252.

¹¹ The Regional Director also erred in disregarding the testimony of Jim Meehan, who testified that while previously serving as a Maintenance Supervisor in Connecticut he would "delegate [Maintenance Technicians'] workload daily[.]" Tr. at 20. Meehan assigned work verbally and through "MRI," an electronic work assignment system that receives residents' service requests related to apartments and common areas. Tr. at 53-55. After a service request appears in MRI, Maintenance Supervisors assign the work necessary to resolve the service request to a Maintenance Technician. Tr. at 175, 623. If a Maintenance Technician begins work on an unassigned service request, the Maintenance Supervisor has authority to reassign the Maintenance Technician to other work the Maintenance Supervisor deems a higher priority. Tr. at 288-289, 638. Maintenance Supervisors also assign the performance of work necessary for maintaining and repairing apartment units vacated by residents (a process referred to as an apartment "turn") through MRI, utilizing a scheduling platform known as a "Make Ready Master Schedule," also referred to as a "turn board." Tr. at 2, 54-55, 113. Meehan assigned work based upon Maintenance Technicians' ability, proficiency, and skill, and the priority or time-sensitive nature of service requests. Tr. at 22-24, 52, 54. Meehan testified that Maintenance Supervisors are also responsible for assigning work in a cost-effective manner, and assigning overtime and approving or denying vacation requests. Tr. at 27-28, 150, 165-166, 175. Meehan's responsibilities as a Maintenance Supervisors were the same as those for Maintenance Supervisors in Westchester. Tr. at 35.

Perez detailed that Maintenance Supervisors “take the lead in assigning the work, making sure everything is done safely, and also prioritizing, depending on the jobs and the day-to-day.” Tr. at 216. Perez explained that Maintenance Supervisors schedule Maintenance Technicians to perform specific tasks, such as by assigning Maintenance Technicians to perform the different types of work required to “turn” an apartment, and scheduling that work using the Make Ready Master Schedule. Tr. at 218. Maintenance Supervisors similarly assign and schedule specific Maintenance Technicians to perform work orders submitted by residents during maintenance team “huddles” or through MRI. Tr. at 194-195, 200-201, 216, 219-220.¹²

Sadik Rizai, who served as a Maintenance Manager at the White Plains and Somers communities at the time of the hearing, testified that Maintenance Supervisors possess authority to assign. Rizai testified that while he supervised Maintenance Supervisors, Jeffrey Ryska, Pieragostini and Da Silva, each prioritized and assigned work to Maintenance Technicians for apartment turns, service requests, and common area projects. Tr. at 435-436, 438-439, 469.

For apartment turns, Maintenance Supervisors perform move-out inspections once a departing resident vacates an apartment. Tr. at 469. Maintenance Supervisors evaluate the condition of the apartment to determine the extent of any damage and whether specific areas in the apartment need repair. Tr. at 469. Using that information, they assign the different work necessary for each vacated apartment to specific Maintenance Technicians in the Make Ready Master Schedule. Tr. at 440-442. Maintenance Supervisors also initiate “common area projects” throughout the communities in areas outside of residents’ apartments. by evaluating the condition

¹² While AvalonBay schedules when the maintenance department is open, Maintenance Supervisors and Maintenance Managers schedule the specific days and hours that Maintenance Technicians work. Tr. at 256-257. The Regional Director’s disregard of Perez’s testimony regarding the authority of Maintenance Supervisors to schedule Maintenance Technicians’ work, RD Decision at 4-5, is clearly erroneous and should be rejected.

of common areas throughout a community—such as staircases, parking garages, etc.—to determine where repair, upkeep, or maintenance, of common areas are required, and they assign Maintenance Technicians to perform work to complete common area projects. Tr. at 469-470.

Rizai further testified that Maintenance Supervisors possess and exercise the authority to grant or deny vacation requests. Tr. at 447-448. If Maintenance Technicians attempt to submit vacation requests to Rizai, he “direct[s] them to go speak to the maintenance supervisor because [the maintenance supervisor] knows really what’s going on in the day-to-day there[.]” Tr. at 448. Maintenance Supervisors verbally approve such vacation requests and the Maintenance Technicians enter the vacation time into the Kronos timekeeping system, which is then routed to Rizai. Tr. at 486-487. Rizai then accepts such vacation requests so long as correctly entered into Kronos. Tr. 486. Rizai testified that he had never rejected a vacation request approved by Maintenance Supervisors for a reason other than incorrect entry in Kronos. Tr. at 486-487.

Brian Pieragostini, the Maintenance Supervisor at Somers during the critical period, provided a detailed explanation of the apartment turn process: “An apartment turn is when someone moves out, we then go in, we’ll do a checklist of possible damages, or anything in the apartment that needs to be taken care of at that time.” Tr. at 272.¹³ Pieragostini testified that as a Maintenance Supervisor he is responsible for overseeing that all of the categories of work necessary for an apartment turn are completed. Tr. at 272-273. Pieragostini further detailed that he ensures the completion of apartment turn work through assignment of work to Maintenance Technicians using the Make Ready Master Schedule, which is “the plan of how we are structured to get the apartments that are moving out ready, you know, ready for the new residents to come in.

¹³ At the time of the Hearing on Objections, Pieragostini served as a Maintenance Supervisor at the Mamaroneck community. Tr. at 266-267.

This is basically almost a tentative schedule until we know what actually the unit looks like.” Tr. at 273. The schedule for each apartment turn varies “depending on the condition of the apartment.” Tr. at 274.¹⁴ Pieragostini is responsible both for assigning specific categories of work to Maintenance Technicians and scheduling when such work takes place. Tr. at 275-276. When Maintenance Technicians are engaged in other work that conflicts with Pieragostini’s plans, he reassigns Maintenance Technicians to perform the work he deems necessary. Tr. at 275-276.

Pieragostini also monitors MRI to ensure that the Maintenance Technicians he assigns to complete service requests are appropriately completing the service requests. Tr. at 282-283, 288-289. For service requests that he determines require immediate attention, Pieragostini assigns Maintenance Technicians to complete such service requests before other work. Tr. at 296. Similarly, Pieragostini possesses the authority to determine that different categories of work, such as apartment turns, are a higher priority than outstanding service requests, and to assign Maintenance Technicians to complete such work first. Tr. at 286-287. Pieragostini conducts “huddles” with Maintenance Technicians, as well as more formal maintenance meetings with a written agenda, to establish which work Maintenance Technicians will perform, and the priority of such work. Tr. at 286-291, 321-323; Ex. E-27. Pieragostini takes into consideration the costs of addressing service requests when determining the work he assigns to Maintenance Technicians

¹⁴ The Regional Director’s finding that Maintenance Supervisors do not use independent judgment to assign work in the apartment turn process because the tasks are “repetitive, routine, and generally uniform” is clearly erroneous. RD Decision at 10. Pieragostini testified in detail that he must inspect the overall condition and “any working item in the apartment,” including appliances, fixtures, and utilities, assigns Maintenance Technicians to make improvements, repairs, or replacements as he deems necessary, and is responsible for ensuring work is appropriately completed. Tr. at 273-276. Such testimony establishes 2(11) authority to assign. *See Walker-Roemer Dairies, Inc.*, 186 NLRB 430, 430 (1970) (authority to assign established where lead mechanic “makes the initial inspection as to what sort of repair is needed, assigns the work and tells the men ‘which way to do it’, inspects it, and can required it to be done over.”).

and how Maintenance Technicians will resolve maintenance issues. Tr. at 283-284. Pieragostini also possesses and exercises the authority to grant or deny vacation requests. Tr. at 278.

The testimony of Denilson Da Silva, who served as a Maintenance Supervisor at the Mamaroneck community during the critical period,¹⁵ further supports Maintenance Supervisors' authority to assign. Da Silva testified that he is responsible for assigning work to Maintenance Technicians at his community. Tr. at 355. Da Silva confirmed that he assigns Maintenance Technicians to complete the different categories of work for the apartment turn process in the Make Ready Master Schedule. Tr. at 355-358. Da Silva testified that he has the authority to assign Maintenance Technicians to work overtime and has done so. Tr. at 367. Da Silva also testified that he possesses the authority to grant or deny vacation requests, and that he possesses that authority independent of his Maintenance Manager. Tr. at 420-422.

Similarly the testimony of Maintenance Supervisor Jonathan Wilson, called to testify by the Union, supports that Maintenance Supervisors possess supervisory authority to assign. Wilson testified that he addresses the maintenance needs of a community by doing property walks to check issues in places that are not normally visited, monitors MRI, and evaluates whether there is "back-to-back cause for the same issue." Tr. at 576-77. Wilson further testified that he delegates and prioritizes the work he assigns to Maintenance Technicians. Tr. at 579-580. In response to the Hearing Officer's question, Wilson testified that the order in which he prioritizes the work he assigns is not dictated by a checklist or other documents. Tr. at 618-619. Instead, Wilson decides who to assign the performance of work, such as HVAC repair, by taking into account the skills of Maintenance Technicians relative to the demands of the work to be performed. Tr. at 579. Wilson

¹⁵ At the time of the hearing, Da Silva served as a Maintenance Supervisor at the White Plains community. Tr. at 351-352.

also confirmed that he is responsible for ensuring completion of the apartment turn process, and that he assigns Maintenance Technicians to perform the different categories of work required for a turn in the Make Ready Master Schedule or “turn board.” Tr. at 592, 623. Wilson further agreed that he is responsible for organizing and prioritizing the daily work orders for Maintenance Technicians. Tr. at 638. In addition, Wilson testified that his Maintenance Manager, Scott Seeger, only visits his community approximately once per month. Tr. at 637.

Wilson’s testimony was corroborated by Perez, who previously reported to Wilson when Perez was as a Maintenance Technician at the Green community.¹⁶ Perez testified that as his Maintenance Supervisor, Wilson assigned Perez the work he was responsible for performing. Tr. at 194-196. Perez testified that Wilson also exercised the authority to direct Maintenance Technicians to stop performing an ongoing maintenance project and begin performing a different maintenance project—such as suspending efforts on completing service requests to instead assist with cleaning up the effects of a flood in a specific apartment building. Tr. at 199. Wilson also approved Maintenance Technicians’ vacation requests and overtime work. Tr. at 196-198.

Wilson attempted to minimize his authority to assign by asserting that Seeger has authority to override his prioritization of assignments, but conceded that Seeger has never overridden any of his assignments, and that the last time his prioritization was overridden was “[p]robably a couple years ago,” without citing a specific example. Tr. at 577-578. Wilson further denied he ever held meetings with Maintenance Technicians to discuss work priorities, despite the existence of an agenda for a “MS, Tech 3 Meeting” identifying Jonathan Wilson as the host and listing meeting topics such as “turn priorities,” “outstanding work orders,” and “[d]own time projects.” Tr. at 624-

¹⁶ At the time of the hearing, Wilson served as Maintenance Supervisor at AvalonBay’s Ossining community. Tr. at 572.

626; Ex. E-26. Wilson conceded, however, that he has had a “group discussion” with Maintenance Technicians about “performance and what we could do to make things better.” Tr. at 627.¹⁷

The Make Ready Master Schedules admitted into evidence display some of the different work tasks Maintenance Supervisors assign to Maintenance Technicians. Ex. E-2 – E-4. For example, the Make Ready Master Schedule for White Plains indicates that Da Silva assigned Maintenance Technician Blei De Carvalho to perform maintenance work for apartment unit 1509, and scheduled that work to take place on October 14, 2019. Ex. E-3; Tr. at 355-358. The detail report also indicates that Da Silva assigned Maintenance Technician Romulo Riera to perform maintenance work for apartment unit 121 on October 16, 2019 and painting work on October 17, 2019. Ex. E-3; Tr. at 355-358.

The 2017 and 2018 performance evaluations for Pieragostini, Da Silva, Wilson, and Ryska also establish that Maintenance Supervisors possess and exercise supervisory authority to assign. The performance evaluations rate Maintenance Supervisors on their responsibilities to “[s]chedule and oversee the apartment home turnover” process and “prioritize, delegate to assigned staff, and execute service requests [.]” Ex. E-15 – E-22. For example, Pieragostini’s 2018 performance evaluation provides that for the apartment turn process “he got the just [sic] of it with bringing things in house and working with the schedule and the office to get the turn done in a cost effective way.” Ex. E-16. Concerning service requests, the evaluation provides that “Brian did well with this in regards to scheduling the service call with the right tech. He and the team provide quality work. He is able to prioritize service request accordingly.” Ex. E-16. Further, for the responsibility of maintenance oversight, the evaluation notes “Brian has been given a few projects along the way,

¹⁷ Perez, who testified that Wilson conducted huddles as a Maintenance Supervisor at Green to explain the day’s work, priorities, or projects, corroborated Wilson’s testimony. Tr. at 194-95.

for example the cleaning and reconstruction of 7 apts after a flood at the community. He was managing the vendors and the communication from them to the office. Also continue to work with the team in turns and MRI. Maintaining the building and all the needed PMs.” Ex. E-16.

In addition, the agendas Maintenance Supervisors have created for maintenance meetings denote the assignments and priorities Maintenance Supervisors communicated to Maintenance Technicians. Ex. E-26 – E-27. The agendas include meeting topics communicated to Maintenance Technicians regarding assignments that Maintenance Supervisors determined to prioritize, such as Pieragostini’s directive on May 1, 2018 that Maintenance Technicians’ apartment turn work assignments took precedence over service requests. Ex. E-27; Tr. 286-287.

Lastly, the time records for Maintenance Technicians support that Maintenance Supervisors possess authority to grant or deny requests for vacation or overtime. Ex. E-38. The time records indicate that Maintenance Supervisors Pieragostini, Da Silva, Wilson, and Ryska possessed supervisory authority over the time Maintenance Technicians submit in the Kronos timekeeping system, including the authority to approve overtime the Maintenance Technicians were required to work. Ex. E-38.

2. The Regional Director’s Determination that Maintenance Supervisors Do Not Possess 2(11) Supervisory Authority to Assign Is Clearly Erroneous and Departs from Applicable Board Precedent

(a) *Maintenance Supervisors Assign Maintenance Technicians to a Place, and Time and Delegate Significant Overall Duties*

The Regional Director erred by concluding that Maintenance Supervisors do not possess 2(11) authority to assign because they “have little, if any, input in designating technicians to particular communities or shifts, and . . . the hours of work are for the most part set by the Employer at a higher level.” RD Decision at 9. The Board construes “the term ‘assign’ to refer to the act of designating an employee to a place (*such as a location, department, or wing*)[.] *Oakwood*

Healthcare, Inc., 384 NLRB 686, 689 (2006) (emphasis added). Here, the evidence demonstrates that during the apartment turn process Maintenance Supervisors assign Maintenance Technicians to specific locations within each community, and make similar assignments for residents' service requests submitted through MRI and for the completion of maintenance projects throughout a community, which can consist of multiple buildings.¹⁸ Maintenance Supervisors also possess authority to reassign Maintenance Technicians to perform different tasks required for apartment turns, and thus possess authority to reassign Maintenance Technicians to different locations. *See, e.g.*, Tr. at 275-276 (Pieragostini reassigns Maintenance Technicians to perform different tasks at different locations). Contrary to the Regional Director's misapplication of Board authority, such reassignment to different locations establishes authority to assign. *See Oakwood* at 698 ("[A]ssignment of nurses to specific geographic locations within the emergency room fall within our definition of 'assign' for purposes of Section 2(11).").

Maintenance Supervisors also appoint Maintenance Technicians to a time. Contrary to the Regional Director's conclusion on the issue, multiple witnesses testified that Maintenance Supervisors possess the authority to assign Maintenance Technicians to work overtime.¹⁹ *See Arlington*, 399 NLRB n.10 ("It is only necessary to show that an individual possesses supervisory authority within the meaning of the Act; it is not essential to show that the authority was actually exercised.") (citations omitted).²⁰ And, in fact, the preponderance of evidence establishes that

¹⁸ *See, e.g.*, Ex. E-3; Tr. at 355-358 (Da Silva assigned Maintenance Technicians De Carvalho and Riera to apartment units 1509 and 121, respectively).

¹⁹ Tr. at 205, 367.

²⁰ The Regional Director implicitly concedes that Maintenance Supervisors possess authority to assign Maintenance Technicians to a time, characterizing Maintenance Supervisors as providing "little" input for the assignment of time, and basing his ultimate conclusion against supervisory status on a lack of independent judgment. RD Decision at 9. As detailed below, the determination that Maintenance Supervisors do not use independent judgment is clearly erroneous on the record.

Maintenance Supervisors actually do exercise that authority by assigning and approving overtime, as well as requests for vacation. Tr. at 24, 68, 165, 175, 198, 205, 211, 249, 252-253, 278, 320-321, 366-367, 447-448, 486; Ex. E-38. The evidence further establishes that Maintenance Supervisors schedule Maintenance Technicians to perform maintenance work at specific times. This fact is made plain by the Make Ready Master Schedules, which show that Maintenance Supervisors assign Maintenance Technicians to perform work on specific dates. Ex. E-2 – E-4.

(b) Maintenance Supervisors Use Independent Judgment to Assign

The Regional Director conclusion that Maintenance Supervisors do not use independent judgment in connection with any assignment to Maintenance Technicians is based on a misapplication of Board authority and erroneous factual determinations. The Regional Director’s attempt to distinguish *Arlington*, 399 NLRB n.10, fails. There, the Board found that testimony supporting a putative supervisor’s assignment of subordinates to a time using independent judgment was not based on “conclusory” testimony.²¹ The testimony in *Arlington* mirrors the testimony provided by AvalonBay’s witnesses detailed above. *See Id.* at 817-18 (putative supervisor schedules employees, approves time off, and assigns hours of work and overtime). Moreover, the Regional Director fails even to identify the conclusory testimony with which he takes issue. Thus, the Regional Director “disregarded relevant evidence and thereby clearly erred in finding [putative supervisors] did not exercise statutory supervisory authority with respect to the assignment[.]” *The Arc of South Norfolk*, 2018 WL 3914704, at *1 (NLRB Jan. 17, 2018).²²

²¹ Notably, the dissent in *Arlington* came to the opposite conclusion, finding the “testimony was purely conclusionary and failed to offer any specific instances or examples of [the putative supervisor]’s exercise of independent judgment.” 339 NLRB at 819, n.11 (Walsh dissenting).

²² *See also Universal Camera Corp v. NLRB*, 340 U.S. 474, 487 (1951) (finding the Board must “tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn” rather than simply disregarding such evidence).

The Regional Director also erroneously concluded that no independent judgment is used to prioritize and assign because the work performed is repetitive, routine, and generally uniform, and thus indistinguishable from the lack of supervisory authority found in *Shaw, Inc.*²³ and *Croft Metals, Inc.*²⁴ See RD Decision at 9-10. In reaching this conclusion, the Regional Director again departs from applicable Board authority. Unlike in *Shaw* and *Croft Metals*, the assignment of specific Maintenance Technicians is not self-evident. Maintenance Technicians are not hired based on specialized classifications and their work assignments are not limited to a specific subset of specialized work. Ex. E-5, P-3, P-4, P-5.

Additionally, Maintenance Supervisors prioritize and assign work through the Make Ready Master Schedule, which is “almost a tentative schedule until [the Maintenance Supervisors] know what actually the unit looks like.” Tr. at 273. The maintenance tasks required for each apartment turn are not the same because “[e]very unit brings its own, you know, task depending on it.” Tr. at 274. Maintenance Supervisors’ assignment of tasks is not dictated by detailed instructions or significantly circumscribed by managerial oversight. Tr. at 619 (no checklists prescribe how to prioritize assignment of work). While, Maintenance Supervisors have a goal “to turn an apartment over in eight days[,]” there are times that the process extends for a longer period of time, as schedules vary “[d]epending on the condition of the apartment.” Tr. at 104, 274.

Further, Maintenance Supervisors prioritize and assign work to Maintenance Technicians for service requests, common area projects, and larger scale projects such as the reconstruction of apartments following a flood. See Tr. at 282-283, 286-289, 438-439, 469-470; Ex. E-16. Without

²³ 350 NLRB 354, 355-56 (2007) (supervisor made self-evident decisions to assign operators to operate heavy equipment, fusers to fuse plastic pipes, and welders to work with metal pipes).

²⁴ 348 NLRB 717, 718 (2006) (classifications such as glaziers, framers, and screen rollers generally performed the same task consistent with their classification every day).

explanation, the Regional Director failed to address any of the evidence concerning Maintenance Supervisors' authority to assign Maintenance Technicians in connection with this type of work unrelated to apartment turns.

The Regional Director determined that no assignment of work by Maintenance Supervisors involves independent judgment both because “[t]here is no evidence that [Maintenance Technicians] are distinguishable to a significant degree by special skills” and “the assignments made by the maintenance supervisors here are . . . largely based on the known skills of technicians[.]” RD Decision at 10-11. These conflicting determinations cannot be reconciled. If Maintenance Technicians do not possess distinct skills capable of distinguishing any one Maintenance Technician from another, Maintenance Supervisors cannot logically assign work to Maintenance Technicians based on the very skills the Regional Director found to be indistinguishable. Further, under *Oakwood*, consideration of the nature of the work and “skills or special training of available . . . personnel” when making an assignment demonstrates independent judgment in connection with the assignment. 348 NLRB at 693.

Lastly, the Regional Director erroneously contends that the Maintenance Supervisors do not possess 2(11) authority to assign because “the consequences of ‘assignments’ made by maintenance supervisors are relatively modest, by comparison with those made by those charge nurses in *Oakwood* or the dispatchers in *Entergy* who were found to be supervisors.” RD Decision at 10 (emphasizing the “life and death consequences” of assignments in *Oakwood*). The Regional Director’s contention conflicts with applicable Board authority. For example, the Board found the putative supervisor in *Arlington*, 339 NLRB 817, possessed supervisory authority despite the employees’ position as a maintenance supervisor in a vehicle maintenance garage. As here, the consequences of such maintenance garage work do not implicate “life and death consequences.”

Moreover, requiring the consequences of assignments by Maintenance Supervisors to rise to the level of life and death matters would hold AvalonBay to an added requirement that does not exist in Section 2(11) of the Act. *See* 29 U.S.C. § 152(11).

3. The Regional Director's Determination that Maintenance Supervisors Do Not Possess 2(11) Authority to Responsibly Direct Is Clearly Erroneous and Departs from Board Law

An individual possesses the authority to responsibly direct employees when he or she oversees assigned work, acts to correct inadequate performance, and directs employees to perform certain tasks when the individual “determines that such tasks are necessary.” *Golden Crest*, 348 NLRB at 730. “[F]or direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Oakwood*, 348 NLRB at 691-92. The putative supervisor also must utilize independent judgement to decide “what job shall be undertaken next or who shall do it[.]” *Id.* at 691. Independent judgment is shown when supervisors direct employees to perform tasks by assessing criteria such as “the quantity of work to be assigned, the relative difficulty of the work involved, and the competence of the staff available to do the work.” *Id.* at 697. Supervisors’ role in assigning Maintenance Technicians to perform particular tasks is detailed above, *supra*, in Sections III.B.1-2. The Regional Director erroneously concluded the evidence does not establish 2(11) authority to responsibly direct. RD Decision at 11.

(a) *Maintenance Supervisors Direct the Work of Maintenance Technicians Using Independent Judgment*

The Regional Director’s conclusion that Maintenance Supervisors do not responsibly direct work using independent judgment is contrary to the record and unsupported by applicable Board

law.²⁵ The Regional Director, in the same manner as the Hearing Officer before him, does not cite to or explain how any evidence supports that “the work of the technicians is largely repetitive and the manner of performance of the work is largely proscribed by the Employer at levels above that of the maintenance supervisors.” RD Decision at 11. Indeed, the Regional Director does not even make clear if he adopts the Hearing Officer’s finding on the issue. The Regional Director instead merely states that the Hearing Officer made such a finding, and that “even if the maintenance supervisors could be found to ‘direct’ the technicians, [the Hearing Officer] found that the record evidence does not show that they are held accountable for the technicians’ work performance.” *Id.*

Here, the evidence demonstrates that Maintenance Supervisors direct Maintenance Technicians because each “decides what job shall be undertaken next or who shall do it.” *Oakwood* at 691. For example, Pieragostini testified that if a service request for a leak is submitted in MRI he would direct a Maintenance Technician “hey, let’s take care of the leak, and then after that’s fixed we can go[.]” Tr. at 289. Pieragostini further testified that he will direct a Maintenance Technician to complete one service request prior to another because Pieragostini deems the service request to be more urgent. Tr. at 296. Similarly, Da Silva testified regarding his directing Maintenance Technicians Riera and De Carvalho to perform apartment turn work, such as painting before maintenance work, or vice versa. Tr. at 355-358; Ex. E-3. Thus, Maintenance Supervisors decide “what job shall be undertaken next or who shall do it[.]” *Oakwood*, 348 NLRB at 691.

In doing so, the Maintenance Supervisors use independent judgment because they direct employees to perform certain tasks based on an assessment of criteria such as “the quantity of work to be assigned, the relative difficulty of the work involved, and the competence of the staff

²⁵ For the same reasons argued above, *supra*, Section III.A., the Regional Director’s decision to disregard witness testimony regarding responsible direction, and reliance on the concept of “paper authority” to ignore documentary evidence, RD Decision at 11-12, must be rejected.

available to do the work.” *Oakwood* at 697.²⁶ Pieragostini testified that he has directed Maintenance Technicians to perform maintenance tasks for apartment turns prior to working on service requests because he determined apartment turn work took precedence over service requests. Tr. at 286-287. Maintenance Supervisors also direct Maintenance Technicians to perform maintenance tasks based on the nature of the work to be performed and the relative proficiency and capabilities of Maintenance Technicians. Tr. at 202, 276, 579. Without explanation, the Regional Director ignored such evidence demonstrating that Maintenance Supervisors direct Maintenance Technicians using independent judgment.

(b) Maintenance Supervisors’ Direction is Responsible

The Regional Director erroneously determined that Maintenance Supervisors’ eligibility for wage increases and bonuses based on Maintenance Technicians’ performance of work did not demonstrate “responsible” direction because the evidence did not show specific examples of changes in wage increases and bonus amounts for Maintenance Supervisors. *See Golden Crest*, 348 NLRB at 731, n.13 (“Performance [appraisal] on direction [of subordinates] need not by itself result in a changed term or condition of employment”). Accountability sufficient to establish authority to responsibly direct can take the form of “some adverse consequences [that] may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Oakwood* at 692. Alternatively, an employer may demonstrate accountability with evidence of positive actions (or the prospect of positive actions) that an employer might take with respect to the person directing the employee. *Golden Crest*, 348 NLRB at 731; *Regal Health and Rehab Ctr., Inc.*, 354 NLRB 466, 474 (2009). Thus, an employer may demonstrate accountability through “evidence that a putative supervisor’s rating for direction of subordinates may have, either

²⁶ *See also, supra*, Section III.B.2.b.

by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment.” *Golden Crest*, 348 NLRB at 731. “Such an effect may be positive – such as, for example, a merit increase, bonus, or promotion—or negative—such as, for example, the denial of one or more of the foregoing or some form of counseling or discipline.” *Id.* at n.13.

(c) Merit Increases Establish Accountability

The Regional Director's finding that Maintenance Supervisors are not accountable for Maintenance Technicians' performance of work is clearly erroneous because the merit wage increases Maintenance Supervisors receive are based on an appraisal of how well Maintenance Technicians perform the work directed by Maintenance Supervisors. AvalonBay evaluates each Maintenance Supervisor in nine (9) different performance, or “responsibility,” categories. With regard to the responsible direction of Maintenance Technicians, Maintenance Supervisors are evaluated on their performance in scheduling and overseeing the apartment home turnover process (“Apartment Turns”), prioritizing, delegating and assigning work on service requests (“Service Requests”), and for minimizing and resolving residents' problems and complaints with regard to the directed response to service requests (“Customer Service”). Ex. E-15 – E-22. Thus, such annual performance ratings are a “direct reflection” on the Maintenance Supervisors' direction of Maintenance Technicians and the Maintenance Technicians corresponding performance of assigned work. *See* Tr. at 51, 317-318, 467-75.

Maintenance Supervisors receive one (1) of five (5) ratings, from a low of “did not meet” to a high of “greatly exceeded.” Ex. E-15 – E-22. Based on the overall ratings received in evaluations, Maintenance Supervisors receive an annual merit wage increase of between 0% and 6.5% under AvalonBay's Annual Merit Wage Increase Guideline, which dictates the amount of merit wage increases Maintenance Supervisors are eligible to receive each year based their overall

rating in the performance evaluations. Ex. E-43. Specifically, Maintenance Supervisors receive an annual merit increase ranging from a low of 0% for an overall rating of “did not meet” to a high of 6.5% for an overall rating of “greatly exceeded.” Ex. E-43.

A review of the total number of evaluation categories, possible ratings for each category, and the ratings Maintenance Supervisors received in performance evaluations demonstrate how the ratings Maintenance Supervisors receive for direction of Maintenance Technicians affects merit wage increases each year. Maintenance Supervisors are rated in nine (9) total categories and receive one (1) of five (5) possible ratings for each category. Assigning a value of one (1) for “did not meet, two (2) for “partially met”, three (3) for “fully met,” four (4) for “exceeded,” and five (5) for “greatly exceeded” and totaling the ratings that Ryska received in his 2018 evaluation results in a rating total for Ryska of 22. Ex. E-22. Dividing Ryska’s 2018 evaluation rating total by the nine (9) categories of evaluation yields an overall rating of 2.44. In other words, Ryska received an overall rating of “partially met” in his 2018 evaluation. Ex. E-22. Such an overall rating limited Ryska’s annual merit wage increase to between 0.25% and 2.0%. In comparison, assigning the same values to the ratings Wilson received in 2018 and dividing his evaluation rating total of 33 by the nine (9) categories of evaluation yields an overall rating of 3.67, which corresponds to the “exceeded” overall rating Wilson received in 2018. Ex. E-18. Wilson’s rating entitled him to an annual merit wage increase of between 2.25% and 5.0%. Ex. E-18. Thus, each Maintenance Supervisor’s performance evaluation “rating for direction of subordinates . . . [has] an effect on that person’s terms and conditions of employment.” *Golden Crest*, 348 NLRB at 731.

The Regional Director ignored and discounted such evidence in determining that “the record is devoid of actual examples linking the maintenance supervisor’s ratings or bonuses to the

work of technicians under them.” RD Decision at 12.²⁷ Such discounting of evidence in this manner is patently erroneous:

We emphasize that the effect on employment terms may flow from a putative supervisor's performance rating for direction of subordinates in combination with other performance factors. **Performance on direction need not by itself result in a changed term or condition of employment.** For example, where (unlike here) an employer's performance appraisal system is shown to affect wages, bonuses, promotions, or other terms and conditions of employment, if a putative supervisor would be rated “outstanding” overall if rated “outstanding” on all performance factors *except one*, **the fact that a “needs improvement” rating on direction of subordinates would not affect an employee's overall “outstanding” rating would not by itself defeat a showing of accountability.**

Golden Crest, 348 NLRB at 731, n.13 (emphasis in bold added).

(d) *Incentive Bonuses Establish Accountability*

The Regional Director’s finding that Maintenance Supervisors are not accountable for Maintenance Technicians’ performance of work is clearly erroneous because the bonuses Maintenance Supervisors receive are based on how well Maintenance Technicians perform work directed by Maintenance Supervisors. Maintenance Supervisors are eligible to receive incentive bonuses of between 2.5% and 7.5% of their annual base salary and Maintenance Technicians are ineligible for such incentive bonuses. Tr. at 27-29, 47, 369; Ex. E-46. AvalonBay awards incentive bonuses based on four criteria: (1) customer satisfaction; (2) overall controllable maintenance expenses; (3) resolution on first attempt; and (4) move-in success. Tr. at 27-29; Ex. E-46.

These four (4) bonus criteria are contingent on the performance of the Maintenance Technicians the Maintenance Supervisors direct. For example, resolution on first attempt measures whether a Maintenance Technician who a Maintenance Supervisor chose to perform a particular task successfully resolved the issue on the first attempt. Tr. at 26-29, 281-82, 478-79.

²⁷ AvalonBay submitted the last two annual performance evaluations for all four (4) Maintenance Supervisors into evidence at the hearing. Ex. E-15 – E-22. The Maintenance Supervisors received individualized and varied performance ratings in the evaluations. *Id.*

Likewise, move-in success rate measures whether the Maintenance Technicians chosen to complete an apartment turn resolve all issues in the apartment such that a new resident does not submit service requests within 15 days of moving in. Tr. at 49-51, 221, 479. Incentive bonuses are also contingent on how efficiently Maintenance Supervisors assign work to Maintenance Technicians. For example, one component of overall controllable maintenance expense is whether Maintenance Supervisors effectively controls overtime costs. Tr. at 28, 150, 166, 476; Ex. E-46. Thus, bonuses are based on responsible direction of Maintenance Technicians.

(e) Corrective Action Establishes Accountability

Contrary to the Regional Director's determination, Maintenance Supervisors take action in correcting Maintenance Technician performance and implement related corrective actions such as counseling or training. For example, Perez testified that, as a Maintenance Manager, when he receives "a complaint from a resident. Instead of me going straight to a tech and talking to him about the complaint I would discuss it with the supervisor to see if he was aware of it, and if he'd done something about it." Tr. at 265. Similarly, Pieragostini testified that he coached Maintenance Technician Cleyber Contreras regarding performing maintenance work in more cost-effective ways. Tr. at 283-285; Ex. E-6, p. 2. Likewise, Wilson testified that he continuously reviews MRI to monitor for deficient Maintenance Technician performance resulting in "back-to-back cause for the same issue." Tr. at 577. When presented with such deficient performance, Wilson testified: "Then I'll step in and -- and I'll go see how I can help out -- and assist them." Tr. at 577. Further, Wilson admitted that he meets with Maintenance Technicians to discuss whether or not service requests were being completed on time and appropriately. Tr. at 628. As such evidence is

unrefuted in the record, the preponderance of evidence establishes that Maintenance Supervisors do correct Maintenance Technician performance and provide related training.²⁸

4. The Regional Director's Determination that Maintenance Supervisors Do Not Possess 2(11) Authority to Hire is Clearly Erroneous and Contrary to Board Law

Contrary to the record,²⁹ the Regional Director erroneously concluded that Maintenance Supervisors lack authority to hire or to effectively recommend hiring. RD Decision at 7-8. At the Hearing on Objections, Maintenance Supervisor DaSilva testified that he was responsible for interviewing job applicants and then recommending whether or not to hire the applicant. Tr. at 365-366. DaSilva and Maintenance Manager Rizai interviewed Romulo Riera together for a Maintenance Technician II position, DaSilva recommended Riera's hire, and AvalonBay hired Riera. Tr. at 449-450, 512-513. Rizai testified that he would follow Da Silva's recommendation to hire a candidate even if, from Rizai's perspective, the candidate failed the interview. Tr. at 488. Rizai also testified that after an interview he conducted with Da Silva, AvalonBay did not hire a job applicant when Da Silva recommended against hiring the applicant. Tr. at 452.

Maintenance Supervisor Pierogastini testified that he and Perez conducted interviews together for multiple Maintenance Technician applicants, including Maintenance Technicians Ubaldo Cujar, Ignacio Munoz, and Stuart Ramsey. Tr. at 276-279; Ex. E-32. In each instance, AvalonBay followed Pierogastini's hiring recommendation. Tr. 278-279; Ex. E-41. Further, when

²⁸ See *Cnty. Educ. Ctrs., Inc.*, 360 NLRB 85, 85 (2014) (“[T]he Acting Regional Director set the standard for corrective action too high, as the threshold of corrective action for purposes of demonstrating responsible direction falls below that of other Section 2(11) indicia, including disciplinary and promotion authority.”).

²⁹ See, e.g., Tr. at 452.

Perez worked as a Maintenance Supervisor, he interviewed, recommended, and ultimately signed the job offer for Maintenance Technician Jeffrey Villar. Ex. E-5.³⁰

Maintenance Supervisor Wilson sought to minimize his “input” in the hiring process, but admitted that he participated in the interview process for Maintenance Technicians. Tr. at 586-587. Further, documentary evidence, in the form of an offer letter signed by Wilson on behalf of AvalonBay, illustrates that Wilson does in fact, play a central role in AvalonBay’s hiring process. Ex. E-39. Wilson hired Cliff Paulino as a Maintenance Technician III, a position Paulino continued to hold at the time of the hearing. Ex. E-32, E-39. Wilson also recommended Perez for a position as Maintenance Technician III at the Green community. Tr. at 193-94. Additionally, the evidence establishes that the Maintenance Supervisors effectively recommend the hiring of Maintenance Technicians because Maintenance Managers have followed the recommendations of Maintenance Supervisors to hire and refrain from hiring Maintenance Technician applicants. Tr. at 278-79, 365-66, 449-50; *see Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001) (finding food department managers who conduct interviews, including joint interviews with higher-level managers, effectively recommend applicants for hire despite higher-level managers occasionally hiring employees for food departments independently);³¹ *Donaldson Bros. Ready Mix, Inc.*, 341

³⁰ The Regional Director ostensibly disregarded all testimony and evidence supporting Maintenance Supervisors’ authority to hire, RD Decision at 8, based on the Hearing Officer’s lone comment that “though I do find Perez to be incredible, his conclusory testimony on [Perez’s hiring of Maintenance Technician Jeffrey Villar] to be implausible and exaggerated.” HOR at 23, n.17. For the same reasons argued above, *supra*, Section III.A., the Regional Director’s decision to disregard record evidence regarding Maintenance Supervisors’ hiring authority must be rejected. *See Universal Camera*, 340 U.S. 474, 487 (1951) (finding the Board must “tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn” rather than simply disregarding such evidence).

³¹ The Regional Director erroneously cites *Fred Meyer* in support of the notion that putative supervisors must engage in “solo interviewing” to possess 2(11) hiring authority. In *Fred Meyer*, the Board specifically found that a meat manager (Brian Hughes) possessed 2(11) hiring authority despite testifying that “he does not do any interviews by himself” and has only “sat in on interviews

NLRB 958, 962 (2004) (supervisory authority to hire established where putative supervisor's recommendations followed a high percentage of the time). Thus, Maintenance Supervisors possess the authority to hire under Section 2(11) of the Act.

The Regional Director reached the opposite conclusion based on his finding that Maintenance Supervisors lack sufficient independence because they do not interview employment candidates alone. RD Decision at 8 (finding an absence of “solo interviewing” and that “in no instance was the maintenance supervisor the only representative of the Employer to meet the candidate before hiring.”). As discussed below, the Regional Director’s conclusions regarding 2(11) hiring authority conflicts with Board law.

The Regional Director’s conclusion that any involvement by higher-level supervisors in the hiring process disproves that a putative supervisor possesses hiring authority is clearly erroneous and contrary to applicable Board authority. *See, e.g., Detroit Coll. of Bus.*, 296 NLRB 318, 318-19 (1989) (putative supervisors who conducted interviews with higher-level supervisor and provided hiring recommendation to reach a hiring “joint decision” possess authority to effectively recommend hiring); *Fred Meyer*, 334 NLRB at 649 (putative supervisors who made hiring recommendations after joint interviews possess 2(11) hiring authority). Further, although the Board found evidence that putative supervisors conducting hiring interviews alone was sufficient to establish 2(11) hiring authority in *Donaldson*, the foregoing cases demonstrate that “solo interviewing” is not a prerequisite to demonstrate supervisory status as the Regional Director erroneously contends.

with [a higher-level supervisor] and . . . made specific recommendations regarding hiring which typically have been followed.” 334 NLRB at 648-49.

Moreover, despite acknowledging that statutory authority to hire may be established by a putative supervisor's recommendation against hiring, the Regional Director nonetheless concluded that Maintenance Supervisors possess no such authority because the Hearing Officer "did not emphasize the reliability of the testimony of the Employer witnesses on this point" and "did not accord any weight to the Employer's witnesses on this point." RD Decision at 8. Regardless of the Regional Director's interpretation of the Hearing Officer's weighing of evidence, AvalonBay's witnesses provided specific and unrefuted testimony that a Maintenance Supervisor's recommendation against hiring would be followed, and had in fact been followed in the past. *See* Tr. at 454, 488. Such testimony establishes 2(11) authority to hire.³²

5. The Regional Director's Determination that Maintenance Supervisors Do Not Possess 2(11) Authority to Promote or Reward is Clearly Erroneous and Contrary to Board Law

The Regional Director concluded that Maintenance Supervisors do not possess 2(11) authority to promote or reward based on a disregard of relevant evidence. Without any cogent explanation, the Regional Director again adopted the Hearing Officer's erroneous determination that the evidence and testimony AvalonBay presented held no weight. In doing so, the Regional Director ignored the testimony of Maintenance Supervisors, such as that of Da Silva,³³ to find that Maintenance Supervisors do not effectively recommend the promotion or reward of Maintenance Technicians. Contrary to the Regional Director's unfounded conclusion, Maintenance Supervisors

³² Indeed, even testimony in the hypothetical that a putative supervisor's recommendation against hire would be a decisive factor in hiring decisions has been found to support 2(11) authority to hire via effective recommendation. *See Sheraton*, 350 NLRB at 1118 ("Although [the higher-level supervisor] **did not discuss specific examples** of [the putative supervisor] giving a negative hiring recommendation, Section 2(11) requires only possession of authority to carry out an enumerated function, not its actual exercise.") (emphasis added); *see also Bluepearl Specialty and Emergency Pet Hosp.*, No. 19-UC-239832, 2020 WL 931413, at *1, n.1 (NLRB Apr. 10, 2020).

³³ Tr. at 360.239832.

have the authority to effectively recommend promotions as well as to reward employees.

Demonstrating supervisory authority to promote or reward requires showing that a putative supervisor effectuates promotions or rewards directly, via effective recommendation, or otherwise, such as through employee evaluations. *See, e.g., Passavant Health Ctr.*, 284 NLRB No. 62, at 7 (1987) (noting that where putative supervisors are responsible for performance evaluations used to determine increased compensation to employees such evaluations demonstrate authority to reward); *Pine Manor Nursing Ctr.*, 270 NLRB 1008, 1009 (1984) (feedback from putative supervisors that affected potential bonus compensation demonstrates 2(11) authority to reward).

DaSilva testified that as a Maintenance Supervisor he effectively recommended Lucas Peterle's promotion to the Maintenance Technician III position. Tr. at 360. DaSilva recommended Peterle to Maintenance Manager Ralph Capozzi. Tr. at 360-364. Following the recommendation, DaSilva and Capozzi interviewed Peterle together. Tr. at 363. Ultimately, AvalonBay accepted DaSilva's recommendation and promoted Peterle to Maintenance Technician III. Tr. at 364.

Further, Maintenance Supervisors complete annual performance evaluations for Maintenance Technicians. Pieragostini provided detailed testimony regarding the performance evaluations he completed for Maintenance Technicians and his reasons for assigning the performance evaluations to the Maintenance Technicians he supervised. Tr. at 280-286, 317-318. Perez testified that while he supervised Pieragostini, Pieragostini completed performance evaluations for the Maintenance Technicians he supervised. Tr. at 226-228. Perez confirmed that he followed Pieragostini's recommendations for the performance evaluations Pieragostini provided. Tr. at 228. Rizai similarly testified that Da Silva provided the performance evaluations for each of the Maintenance Technicians Da Silva supervised. Tr. at 462-463. As detailed above, *supra* Section III.C.2.a., the performance evaluations AvalonBay's maintenance employees

receive dictate the amount of their annual merit wage increases. *See also* Tr. at 317-318; Ex. E-6 – E-7, E-43. Therefore, Maintenance Supervisors possess and exercise the authority to effectively recommend the promotion and reward of Maintenance Technicians.

6. The Regional Director's Determination that Maintenance Supervisors Do Not Possess 2(11) Authority to Discipline Is Clearly Erroneous and Contrary to Board Law

In concluding that Maintenance Supervisors do not possess authority to discipline, the Regional Director ignored relevant evidence and testimony that Maintenance Supervisors have terminated Maintenance Technicians and issued disciplinary actions that are placed in employees' personnel files and are part of the disciplinary process. "To establish the supervisory authority to discipline, asserted disciplinary authority 'must lead to personnel action without independent investigation by upper management.'" *Veterans Care Ctrs. of Ore.*, No. 19-RC-207332, 2017 WL 6507197 (Oct. 30, 2017) (citing *Veolia Trans. Servs.*, 363 NLRB No. 98, at 7 (2016)). Where counseling serves as a step to future discipline, such as through progressive discipline, power to issue counseling forms may establish supervisory authority to discipline. *See Berthold Nursing Care Ctr., Inc.*, 351 NLRB 27, 28 (2007) ("[I]t is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee." (citing *Promedica Health Sys.*, 343 NLRB 1351 (2004))).

While working as a Maintenance Supervisor, Perez issued an Associate Discussion Record to a Maintenance Technician for leaving work early. Ex. E-8. Similarly, Ryska issued multiple Associate Discussion Records because Maintenance Technicians failed to approve their timecards, and failed to notify him of late arrival to work. Ex. E-9 – E-11. The documents are placed in employee personnel files and serve as a step in the progressive discipline process. Tr. at 88, 182. Further, Maintenance Supervisors have acted to effectively recommend the discharge of

Maintenance Technicians with unsatisfactory job performance. In 2015, while working as a Maintenance Supervisor, Perez recommended the termination of Jeffrey Villar for unsatisfactory work performance. Ex. E-40. Individuals currently working as Maintenance Supervisors retain this authority, as the responsibility of Maintenance Supervisors has remained unchanged since 2015. Tr. at 84, 270, 354, 576-579. The infrequency of the need to terminate Maintenance Technicians, and the corresponding infrequency of the opportunity for current Maintenance Supervisors to recommend the termination of Maintenance Technicians, does not negate that Maintenance Supervisors retain authority to effectively recommend discipline, up to and including termination. *See Fred Meyer*, 334 NLRB at 649, n.8. Thus, Maintenance Supervisors possess the authority to discipline Maintenance Technicians, and the Regional Director's conclusion to the contrary disregards relevant evidence and departs from applicable Board authority.

7. Secondary Indicia Further Support that Maintenance Supervisors Possess 2(11) Authority

The Regional Director's disregard of secondary indicia is based on his finding that no evidence supports any primary indicia of supervisory authority, which, as detailed above, is contrary to the evidence and Board authority. Accordingly, the Regional Director's disregard of secondary indicia is clearly erroneous. Maintenance Supervisors possess numerous indicia of supervisory status, which provide strong corroborating evidence that Maintenance Supervisors are Section 2(11) supervisors. *See Gerbes Super Mkt., Inc.*, 213 NLRB 803 (1974); *Sheraton*, 350 NLRB 1114. In addition to the examples set forth above, examples of how Maintenance Supervisors' terms and conditions of employment vary from those of Maintenance Technicians include: Maintenance Supervisors receive additional training regarding management responsibilities (Tr. at 25; Ex. E-23 – E-25); enter their time online rather than using biometric devices (Tr. at 24); review and approve Maintenance Technician time cards (Ex. E-38); approve

vacation time requests (Tr. at 617); evaluate the performance of Maintenance Technicians (Ex. E-6 – E-7); receive higher pay rates (Ex. E-44); receive reimbursement for cellphones whereas Maintenance Technicians do not receive reimbursement (Tr. at 174, 181); and are viewed as leaders (Tr. at 641; Ex. E-17 – E-18). Further, Maintenance Supervisors attend management meetings where Maintenance Technicians are not present. Tr. at 629; *Dean & Deluca N.Y., Inc.*, 338 NLRB 1046, 1048 (2003) (attending management meetings a secondary indicium of supervisory status). They are also held out to the public as supervisors, as they wear ID badges, which list “Maintenance Supervisor” under their name. Tr. at 26; Ex. E-29. These indicia confirm Maintenance Supervisors’ supervisory status.

C. The Election Should Be Set Aside Due to Supervisory Taint

The election should be set aside because Maintenance Supervisors tainted the election. The Board employs a two-factor test to determine whether the presence of supervisory taint requires setting an election aside: 1) whether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election; and 2) whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. *Harborside Healthcare, Inc.*, 343 NLRB 906, 916, n.10 (2004). The prounion conduct by Maintenance Supervisors occurred on a widespread basis, taking place in the presence of the vast majority, if not all, of the Maintenance Technicians. Such conduct began shortly before the Union filed the petition and continued until at least approximately 24 hours before the election. The extensive knowledge of such conduct by Maintenance Technicians at a point so close in time to the election is sufficient to have changed the outcome of the election given the margin of victory,

which would be reversed by as few as five (5) votes.³⁴ Thus, the Maintenance Supervisors' prounion and coercive actions so tainted the atmosphere of the election that the results must be set aside. The Regional Director's conclusion to the contrary is clearly erroneous on the record and based on a misapplication of applicable Board authority.

1. Maintenance Supervisors' Conduct Reasonably Tended to Coerce Maintenance Technicians in the Exercise of Free Choice

Under the first prong of *Harborside*, the Board considers "the nature and degree of supervisory authority possessed by the supervisors who engaged in the prounion conduct." *Madison Square Garden Ctr., LLC*, 350 NLRB 117, 121 (2007). As detailed above, Maintenance Supervisors possess meaningful and significant authority over Maintenance Technicians' terms and conditions of employment on a day-to-day basis.

(a) *Maintenance Supervisors Signed and Solicited Authorization Cards*

The Regional Director's decision to disregard testimony regarding Maintenance Supervisors' solicitation of authorization cards is clearly erroneous because the testimony of multiple witnesses corroborated such coercive conduct. "Supervisors solicit[ing] union authorization cards from their direct subordinates" is "inherently coercive." *Madison Square Garden*, 350 NLRB 117 at 122; *Chinese Daily News*, 344 NLRB 1071 (2005). Evidence demonstrates that Maintenance Supervisors signed and solicited authorization cards from Maintenance Technicians. Specifically, testimony establishes that three (3) out of four (4) Maintenance Supervisors (DaSilva, Ryska, and Wilson) signed authorization cards. Tr. at 384-383, 496, 655-656. Further, the testimony shows that Ryska, Da Silva, and Wilson participated in

³⁴ The Board assumes that challenged ballots are cast in favor of the objecting party. *See Harborside*, 343 NLRB at 913 n.23 ("In assessing the size of the margin of victory, the Board will assume the unopened, uncounted challenged ballots were cast in favor of the objecting party." (citing *Acme Bus Corp.*, 316 NLRB 274, 274 (1995))).

widespread prounion discussions with Maintenance Technicians regarding authorization cards throughout the critical period. Tr. at 380-381, 496, 649-650, 653-654.

Wilson testified that conversations took place with Maintenance Technicians regarding authorization cards and the confidentiality of authorization cards during a meeting in the parking lot at the Green community which was attended by approximately 11 to 13 Maintenance Technicians from multiple communities, as well as Da Silva and Wilson. Tr. at 649-650, 653-654.³⁵ Da Silva corroborated Wilson's testimony regarding Maintenance Technician attendance at the meeting. Tr. at 388-90. Discussions at the meeting addressed the topics of authorization cards and authorization card signatures. Tr. at 654. Wilson's testimony also indicates that he was present while other coworkers signed authorization cards. Tr. at 635.³⁶ Further, Da Silva engaged in discussions with Maintenance Technician William Balfe regarding the process of personally submitting an authorization card. Tr. at 380-383. Da Silva discussed obtaining an authorization card with Balfe, received an authorization card from Balfe, and signed the authorization card he received from Balfe. Tr. at 380-384. Similarly, Ryska explicitly promoted to the Maintenance Technicians he supervised at White Plains³⁷ that he signed an authorization card because the Union "was the best option for the employees[.]" Tr. at 496.

Moreover, Da Silva and Wilson collaborated to solicit authorization cards. Da Silva

³⁵ Regarding discussion of authorization cards, Wilson further testified that in talks with Maintenance Technicians he "kind of kept it simple. Didn't want to know anything because everything was confidential, so I didn't want to know any names of anything." Tr. at 632-633.

³⁶ "When the cards was given -- when the cards was given to guys to sign, the guys was under the impression that the cards are confidential through Local 30. . . . We signed cards from Local 30. They -- they're confidential. That's what we assume." Tr. at 635.

³⁷ Ryska supervised seven (7) Maintenance Technicians during the critical period. Ex. E-32. The Regional Director's unexplained assertion that "Ryska was known to be leaving the Employer in the near future" is contrary to the record. RD Decision at 19. The testimony indicates only that he mentioned he "was thinking about leaving the company" on one occasion while walking to a garage area with De Carvalho after work. Tr. at 529.

approached Wilson about submitting signed authorization cards. Tr. at 631. Da Silva asked Wilson for authorization cards to distribute, and Wilson met with Da Silva to provide five (5) to six (6) authorization cards. Tr. at 652. Following the meeting, Da Silva spoke with coworkers at the White Plains community, which he supervised until March 18, 2019,³⁸ regarding the authorization cards. Tr. at 632. After speaking with coworkers and collecting multiple signed authorization cards, Da Silva submitted at least three (3) signed authorization cards to Wilson,³⁹ who submitted the signed cards to the Union. Tr. at 656-657. Wilson's testimony on the subject is unrefuted and not contradicted by Da Silva's testimony. Da Silva testified that he obtained an authorization card from Balfe for his *personal* signature and submission. Tr. at 381-384. Wilson testified that Da Silva obtained multiple authorization cards for *coworkers* at the White Plains community to sign and submit to the Union. Tr. at 631-632, 656-657. Accordingly, the testimony regarding the signing and solicitation of authorization cards by Wilson and Da Silva is entirely consistent.

Moreover, the testimony demonstrates that no less than one (1) authorization card signed by a Maintenance Technician must have been included among the (at minimum) three (3) signed authorization cards Da Silva submitted to Wilson. Wilson and Da Silva testified to individually signing authorization cards separate from the arrangement for Da Silva to obtain signed authorization cards at White Plains. As a result, even assuming, *arguendo*, that the three (3)

³⁸Da Silva's solicitation took place at a community with up to seven (7) employees who he previously supervised. See Tr. 352-353; Ex. E-32, E-45.

³⁹The Regional Director erroneously asserts that Wilson had no basis for knowing "that there were 'more than two'" authorization cards he received back from Da Silva because "he did not look at the contents" of the birthday card in which the authorization cards were transported. RD Decision at 15, 16, n.10. Wilson, however, testified that, after Da Silva provided the authorization cards, "I gave them to Local 30, took them out of the birthday and handed them to them so I don't see the signatures." Tr. 656. Thus, the conclusion that Wilson did not know the contents inside the birthday card or submit sign authorization cards signed to the Union that were solicited by Da Silva is contrary to the record.

authorization cards Da Silva submitted to Wilson after visiting White Plains included authorization cards signed by the two (2) remaining Maintenance Supervisors in Westchester, the last remaining card must have been signed by a Maintenance Technician.⁴⁰ Thus, Maintenance Supervisors' discussion and solicitation of union authorization cards with their direct subordinates was inherently coercive and warrants setting aside the election. *Harborside*, 343 NLRB at 915 (solicitation of authorization cards is inherently coercive).

(b) Maintenance Supervisors Conducted a Coercive Prounion Campaign Which Included Explicit Threat of Benefit Loss

The Regional Director's conclusion that Maintenance Supervisors' prounion campaigning and threats regarding loss of benefits had no influence on Maintenance Technicians is clearly erroneous. The Regional Director's conclusion is based on an unfounded assumption that Maintenance Technicians, contrary to their actual testimony, interpreted such actions as harmless, could not provide any specifics regarding the coercive conduct, and the erroneous finding that Ryska left AvalonBay before the election and widely publicized that fact. Contrary to the Regional Director's erroneous conclusion, Maintenance Supervisors Wilson and Ryska engaged in a pervasive prounion campaign throughout the critical period, reaching most, if not all, Maintenance Technicians. Wilson and Ryska continuously denigrated AvalonBay to Maintenance Technicians up to the very eve of the election. During the pressure campaign Wilson and Ryska mounted, they sought to induce Maintenance Technicians to support the Union in the election, leveraging their roles as Maintenance Supervisors. *See Madison Square Garden*, 350 NLRB at 121 ("first-line supervisor[s with] the most day-to-day contact with the employees ... broadly impact employees'

⁴⁰ The Regional Director's adoption of the Hearing Officer's determination to fault AvalonBay for the absence of testimony on who specifically signed authorization cards must be rejected. RD Decision at 15. The Hearing Officer explicitly prohibited AvalonBay from examining witnesses regarding such signatures. Tr. at 384-385.

daily working lives”). At the very least, the pressure tactics reached the level of unlawful coercion once the threat that AvalonBay would revoke employee housing benefits became part of the prounion campaign strategy.⁴¹ See *First Lakewood Assocs.*, 231 NLRB 463, 476-477 (1977) (setting aside election based on objectionable conduct including threat to revoke housing benefits).

Wilson and Ryska leveraged their roles as Maintenance Supervisors to disparage AvalonBay, convince Maintenance Technicians that they needed protection from AvalonBay and that electing the Union would provide such protection, and that without the Union’s protection AvalonBay would retaliate against employees by revoking housing benefits. From the beginning of the critical period, Ryska publicized to Maintenance Technicians that he was unhappy with his recent transfer and that “[o]nce the Union came in, the -- Avalon wasn’t going to be able to transfer anybody between the locations” Tr. at 497. Ryska continuously commented that electing the Union would increase pay, and asserted that the Union would terminate the requirement for Maintenance Technicians to attend quarterly meetings and cease employee transfers. Tr. at 495, 525. As Riera testified, Ryska made the comments to Maintenance Technicians so frequently that “[e]verybody in [White Plains] would have been present at one point or another; it’s just different occasions.” Tr. at 497.⁴²

⁴¹ During the critical period, five (5) Maintenance Technicians and one (1) Maintenance Supervisor received deeply discounted housing benefits as “on-site” employees at four (4) different AvalonBay communities. See Ex. P-8. In addition, Maintenance Technicians and Maintenance Supervisors who do not serve as on-site employees at their community but live at an AvalonBay community receive a 20% discount on rent. Tr. at 519, 561-562. William Balfe, who serves as a Maintenance Technician III in White Plains, testified that he receives the 20% housing benefit. Tr. at 562. De Carvalho testified that Maintenance Technician Anthony Pagnotta also lives on-site and “could not afford to lose” the benefit” Tr. at 528. Thus, The Regional Director’s assertion that “it is not clear how many, if any, technicians were receiving [housing benefits] during the Spring of 2019” is contrary to the record. RD Decision at 17, n. 12.

⁴² The Board should reject the Regional Director’s approval of the Hearing Officer’s discounting of Riera’s testimony on this point. See RD Decision at 18 (misquoting Riera as stating “that ‘everyone’ was present at some point”). The disregard of Riera’s testimony is based not on

Ryska also attended a meeting run by Union organizer Vincent Fiorentino near the White Plains community, which four (4) Maintenance Technicians also attended, including three (3) Maintenance Technicians Ryska supervised. Tr. at 498-501.⁴³ At the meeting, Ryska told the Maintenance Technicians that “Jim [Meehan] wanted to go ahead and take housing away from the employees, and how, you know, everybody was going to end up on the streets, and with the kids and whatnot . . . [T]hey made it sound like it was—it was a fact, you know, specifically saying it was a fact.” Tr. at 503. Riera, who reported directly to Ryska, recalled that Ryska’s representations regarding “Avalon taking housing away” left nothing to the imagination, “they were, you know, painting the picture that everybody was going to have to be, you know, on the street, on the spot.” Tr. at 505. Riera testified that Ryska appeared to have choreographed the discussion of the threat that AvalonBay was going to revoke Maintenance Technicians’ housing benefits because Maintenance Technician Anthony Pagnotta, who received housing benefits, reacted with surprise when Ryska made the threat, despite the threat having been previously discussed in Pagnotta’s presence. Tr. at 505-506. Indeed, Riera testified that Ryska communicated the housing threat multiple times, including three (3) weeks before the election and on the day before the election.

Maintenance Technician Blei De Carvalho, who also reported directly to Ryska, confirmed that Ryska communicated the housing threats to Maintenance Technicians throughout the critical period while at the same time expressing that the Union “was definitely the way to go.” Tr. at 525.

conflicting testimony, but on the notion that some unstated minimum number of additional witnesses must corroborate Riera before any weight attaches to his testimony regarding Ryska’s prounion campaign, and is plainly contrary to the record. *See* Tr. at 511-512 (explaining that the reference to “everybody” is to “[t]he White Plains techs” with whom Riera worked).

⁴³ Similarly, Wilson and DaSilva attended a meeting at the Green community conducted by Union representatives that approximately 10-15 Maintenance Technicians also attended. Tr. at 388-90. Prior to the meeting, DaSilva invited the three (3) Maintenance Technicians he supervised to attend, and one (1) of DaSilva’s subordinates, Ubaldo Cujar, attended the meeting. Tr. at 387-89.

De Carvalho confirmed that Ryska attended the prounion meeting at the White Plains community along with multiple Maintenance Technicians. Tr. at 527. De Carvalho recounted that at the meeting Ryska stated “Jim [Meehan] was going to retaliate, was going to take away the housing from everybody.” Tr. at 527-528. As a result of Ryska’s threat, De Carvalho explained: “I was kind of -- at the time, I was kind of like scared about it because I don’t know what was going on, if Jim is actually going to retaliate or not, I mean, like, I want to know what’s going on” Tr. at 528. Following the prounion meeting at White Plains where he communicated the threat of housing loss to Maintenance Technicians, Ryska told De Carvalho “I want to make sure that you guys have that, the Union[.]” Tr. at 529.

The day before the election, AvalonBay held a meeting with the employees scheduled to vote in the election. Tr. at 508. All of the Maintenance Supervisors, and all but approximately two of the Maintenance Technicians attended this meeting. Tr. at 396. After the meeting concluded, Wilson asked for an opportunity for the Maintenance Supervisors and Maintenance Technicians to speak amongst themselves, and AvalonBay granted their request. Tr. at 508, 531, 541. During the meeting, Wilson complained that AvalonBay forced him to transfer to a different community, had to move his family because of the transfer, and that he was unhappy with the transfer. Tr. at 636-637. De Carvalho recalled that Wilson “was really mad that Avalon did the whole moving.” Tr. at 532. Wilson further recounted that he had been exposed to a gas leak while working that required his hospitalization, and that he was previously assaulted by an AvalonBay manager. Tr. 636-37. At the meeting, Wilson also criticized AvalonBay saying it “already [had] plenty of time to change things before they got to this point, and if they hadn’t done anything, you know, that time, how could we believe that things were going to be changing now?” Tr. at 509, 540-543.

During this same meeting, Ryska reiterated his “comment about [AvalonBay] wanting to kick people out from housing, once Avalon found out [about the union organizing campaign.]” Tr. at 510. When asked by the Hearing Officer to “describe exactly what [Ryska] said, to the best you can remember,” Riera recounted Ryska’s threat “that once that Avalon found out that employees were trying to bring the Union in, Avalon was going to be taking housing away from the employees, and just basically putting them out in the street.” Tr. at 510. Describing Maintenance Technicians’ reaction, De Carvalho stated “[p]eople were scared and they like – I think they were scared that [Meehan] was going to retaliate **in case the Union wasn’t -- wasn’t in.**” Tr. at 533 (emphasis added).⁴⁴ Thus, the effect of Ryska’s threats is clear—vote for the Union to receive protection or suffer retaliation at the hands of AvalonBay and Meehan.

During a smoking break after Wilson’s speech, Ryska told Maintenance Technician Joseph Savino to beware of his new Maintenance Supervisor, Pieragostini, because “you don’t know what he says behind your back, he says all kinds of crap about you. You’d be so much better off not dealing with that.” Tr. at 544. After the conversation, Savino “was really under the impression that [Ryska] was telling me that I was better off having a shop steward and not having to go through Brian [Pieragostini]”. *Id.* Thus, Wilson and Ryska tainted the election by placing their subordinates in fear of reprisals by AvalonBay immediately before the election. *First Lakewood*, 231 NLRB at 476-477; *Harborside*, 343 NLRB 906.

⁴⁴ Thus, the Regional Director’s strained attempt to characterize the Maintenance Technicians as believing that “the Employer was planning to withdraw housing benefits, regardless of the Union” is unfounded. RD Decision at 17, n. 13. Likewise unfounded is the Regional Director’s assertion that the “uncontradicted testimony was that Meehan told [Wilson] . . . that housing benefits might not always be available.” RD Decision at 21, n. 18. Meehan testified that he never told employees he planned to discontinue housing benefits. Tr. at 138. And Wilson’s testimony regarding Meehan only concerned a potential inability to guarantee housing benefits at a property other than where an employee worked, which Wilson already believed to be the policy in place. Tr. at 614.

Despite the detailed testimony regarding Ryska's repeated threat that AvalonBay and Jim Meehan sought to retaliate against Maintenance Technicians for initiating the election process, the Regional Director concluded that "there seem to have been various discussions in which technicians and maintenance supervisors mentioned a rumor that Meehan had said employees would be losing housing benefits" and "that this supposed manipulation does not amount to conduct the Board has found to be unlawfully coercive." RD Decision at 21. This conclusion is patently erroneous and ignores all of the relevant testimony regarding the threats Ryska communicated to Maintenance Technicians—including the Hearing Officer's own questioning of Riera, who explicitly confirmed to the Hearing Officer that Ryska communicated the loss of housing threat. Tr. at 503.

Further, the Regional Director's conclusion that Ryska's threat did not have any coercive effect because Ryska merely invoked Meehan's name in connection with a "rumor" is unsupported by Board law and logic. The testimony establishes that Ryska continually told Maintenance Technicians that, at a minimum, they were in danger of losing housing benefits because their highest-level supervisor sought to retaliate against them for supporting the Union. *See C & T Mfg. Co.*, 233 NLRB 1430, 1430 (1977) (First-line supervisor threats "accompanied by use of the names of company officials . . . are as coercive upon the employees as if made by the company officials themselves, since they are perforce considered to be authoritative by the employees and taken to be spoken directly for higher management.")). The repetition of Ryska's threat by Maintenance Technicians made the threat all the more pervasive and credible. Thus, contrary to the Regional Director's conclusion, such an "express threat of antiunion retaliation is objectionable" and inherently coercive under *Harborside* "whether or not the supervisor possesses the specific authority to effectuate the threat." *Domino's Pizza LLC*, 368 NLRB No. 142, at 2 (2019); *El*

Rancho Mkt., 235 NLRB 468, n.11 (1978) (“[T]he cases are legion holding that a veiled promise or threat violates Sec. 8(a)(1) of the Act just as surely do more explicit promises or threats.”).

2. Maintenance Supervisors’ Conduct Materially Affected the Election

When determining the effect of supervisory taint on an election, the Board looks to: (a) margin of victory; (b) whether conduct at issue was widespread or isolated; (c) timing of the conduct; (d) extent to which the conduct became known; and (e) lingering effect. *Harborside*, 343 NLRB at 913. The Board weighs each of these factors, but the “test **does not require that all the factors be satisfied.**” *Id.* at 913 n.22 (emphasis added).

(a) *Margin of Victory*

Following Board precedent and assuming the four (4) challenged ballots were cast in AvalonBay’s favor as the objecting party, a shift of only five (5) votes would alter the election results.⁴⁵ Thus, the election should be set aside if supervisory taint could have affected the votes of at least five (5) employees. *Chinese Daily News*, 344 NLRB at 1072.

(b) *Timing of Coercive Conduct and Extent Conduct Became Known*

The timing and extent of Maintenance Supervisors’ coercive actions supports that their conduct materially affected the election, impacting well in excess of the five (5) employees necessary to set aside the election. The three (3) Maintenance Supervisors who engaged in coercive conduct, Ryska, Wilson, and DaSilva had tremendous influence over the majority of eligible voters, well in excess of the five (5) required for a new election. Ryska was the second longest-tenured Maintenance Supervisor, and during the critical period worked at AvalonBay’s second-largest community, White Plains, supervising seven (7) Maintenance Technicians.⁴⁶ See

⁴⁵ Employees cast 18 votes in favor of the Union and five (5) against the Union in the election.

⁴⁶ Ryska remained employed by AvalonBay not only on the day before the election but also through the “[s]ummertime” of 2019. Tr. at 609-610; see also Ex. E-32, p.2 (listing the four Maintenance Supervisors employed by AvalonBay in 2019 whose ballots were each challenged at the election).

Ex. E-32. Ryska previously served as Maintenance Supervisor at Ossining, until March 18, 2019. *See* Ex. E-32, E-45. Thus, in total, Ryska supervised nine (9) Maintenance Technicians who voted in the election. Ex. E-32. Ryska first began conveying the threat of housing loss to Maintenance Technicians three (3) weeks before the election. Tr. at 516. Ryska attended the meeting with a Union representative and Maintenance Technicians at the White Plains community approximately one (1) to two (2) weeks before the election. Tr. at 499. At the meeting, Ryska repeated the threat of housing loss to Maintenance Technicians. Tr. at 503. Ryska continued to make comments in support of the Union and indicated that Maintenance Technicians required protection from AvalonBay. The comments took place approximately every other day at the White Plains community until the election. Tr. at 497.

During this same period of time, Wilson and Da Silva attended prounion meetings with approximately 10-15 Maintenance Technicians from multiple communities. Tr. at 388-90. Prior to his transfer to the Ossining community, where he supervises two (2) Maintenance Technicians, Wilson supervised eight (8) Maintenance Technicians at the Green community. Tr. 572; Ex. E-32, E-45. Moreover, Wilson's status as the longest serving Maintenance Supervisor means that his influence extended over more than the 10 Maintenance Technicians he directly supervised during or immediately before the election. Tr. at 572. Wilson acknowledged the sway he holds over Maintenance Technicians in Westchester, who view him as a "leader." Tr. at 641; Ex. E-18, p. 4.

Wilson further testified that he provided DaSilva with five (5) or six (6) authorization cards, who spoke with employees at White Plains about the cards and returned no less than three (3) authorization cards that Wilson then turned in to the Union. Tr. at 632, 657. Prior to his March

Thus, the Regional Director's unexplained finding that Ryska "ended his employment . . . before the election" is contrary to the record and the determination that Ryska's departure meant his supervisory authority was "fleeting" is clearly erroneous. RD Decision at 16.

18, 2019 transfer to Mamaroneck, DaSilva was Ryska's predecessor for the White Plains community.⁴⁷ Tr. 352, Ex. E-45. Thus, Wilson understood that DaSilva planned to solicit authorization cards from the Maintenance Technicians he previously supervised at the White Plains community. Tr. at 632.

On the day before the election, at a meeting among most, if not all, Maintenance Supervisors and Maintenance Technicians, Wilson continued to air all of his grievances and attempted to persuade coworkers that AvalonBay could not be trusted. Tr. at 509, 540-542, 636-637. At the same meeting, Ryska repeated the housing threat in the full presence of all Maintenance Technicians attending. Tr. at 518. Thus, the Maintenance Supervisors' coercive conduct continued without interruption during the entirety of the critical period and reached most, if not all, Maintenance Technicians.⁴⁸ The Regional Director's attempt to parse out and separately minimize the effect of Maintenance Supervisor's overall course of conduct in the context of the election as a whole stretches the standard set forth in *Harborside* beyond recognition so as to render any coercive conduct acceptable when viewed in isolation.

(c) Lingering Effect

As detailed above, the Maintenance Supervisors' coercive and prounion conduct, in particular the repeated threat of housing loss, continued through the eve of the election. The record

⁴⁷ During the critical period, seven Maintenance Technicians worked at White Plains. Ex. E-32.

⁴⁸ The Regional Director's conclusion that Ryska's prounion campaigning and threat of loss of benefits had no influence is premised on the erroneous finding that Ryska left AvalonBay prior to the election and that knowledge of his departure was widespread. RD Decision at 22. As detailed above, the record contradicts such findings. Similarly, the Regional Director's conclusion that Da Silva could not influence employees is based on the mistaken findings that Da Silva and De Carvalho's testimony indicates Da Silva "told employees he was against the Union." RD Decision at 22. Da Silva only testified that he suggested attempting to postpone the election to "see what [AvalonBay] -- what they offer[.]" Tr. at 400. De Carvalho testified that his conversation with Da Silva was "one-on-one," and thus not conveyed to Maintenance Technicians at large. Tr. at 533.

is devoid of any evidence that the lingering effect of this conduct was ever resolved in a manner that could have allowed employees to exercise their freedom of choice in a free and fair election. *See SNE Enters., Inc.*, 348 NLRB 1041, 1044 (2006) (lingering effect of taint not broken where supervisors' prounion actions continued up until date of election and supervisors never disavowed support for union). Rather than disavowing their prior coercive conduct, Wilson continued his prounion support and Ryska repeated the threat of housing loss to Maintenance Technicians through April 22, 2019, the day before the election.

The Board law the Regional Director relies upon in support of the opposite conclusion is inapposite. In *Terry Machine Co.*, the employer engaged in an aggressive antiunion campaign and "explicitly disavowed" supervisors' support for the union through correspondence to all employees' homes and informed employees in face-to-face meetings that the prounion supervisors "did not represent the company's position." 356 NLRB No. 120, at 4 (2011). The employer further widely disseminated a threat to terminate the supervisors for the prounion conduct, thus mitigating the coercive effect. *Id.* AvalonBay did not disavow the conduct of the Maintenance Supervisors in any manner, and thus absolutely no evidence exists that their prounion conduct was mitigated.⁴⁹ Indeed, no employees testified as to the content of any meetings AvalonBay held regarding the election, much less testify regarding any "unionbusters" campaign by AvalonBay as was the case in *Mid-Wilshire Healthcare Ctr.*, 349 NLRB 1372, 1373, n.10 (2007). The Regional Director's finding that one-time statements among employees regarding giving AvalonBay a chance or forming their own union effectively mitigated the extensive prounion campaign taking place throughout the entirety of the critical period strains credulity, particularly given Wilson's

⁴⁹ *See Domino's Pizza*, 368 NLRB No. 142, at 2 ("Moreover, there is no evidence that the Employer disavowed [the supervisor]'s specific threats encompassed in Objection 2 by reassuring employees they would not be discharged based on their vote in the election.") (citation omitted).

simultaneous rebuke of such statements.⁵⁰ Tr. at 509, 540-543 (“[AvalonBay] already [had] plenty of time to change things before they got to this point, and if they hadn’t done anything, you know, that time, how could we believe that things were going to be changing now?”). Thus, the Regional Director’s conclusion that AvalonBay’s actions mitigated the lingering effects of Maintenance Supervisors’ coercive behavior is pure speculation and must be rejected.⁵¹

IV. CONCLUSION

The Board should reverse the Regional Director’s Decision and Certification of Representative and set aside the election because its outcome was determined by widespread supervisory taint. Unrefuted record evidence establishes that Maintenance Supervisors are Section 2(11) supervisors under the Act. Using their supervisory status, multiple Maintenance Supervisors coerced the Maintenance Technicians they supervised by soliciting them to sign union authorization cards and conveying serious threats of reprisal by AvalonBay. This rampant coercion pervaded the critical period up to and through the 24-hour period before the election. Thus, for the reasons detailed above, the Board should set aside the results of the election.

Respectfully Submitted,

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⁵⁰ RD Decision at 23.

⁵¹ *Mid-Wilshire* at n.10 (“In concluding that the Employer, in these meetings, expressed opposition to unionization, we rely on . . . testimony that a meeting . . . was led by ‘unionbusters,’ . . . We do not rely on the hearing officer’s speculative assertion that ‘[i]t is well known that the type of information provided by employers during union campaigns are [sic] an attempt to persuade employees not to vote for the union.’”).